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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Application by SBC Communications Inc.,)
Southwestern Bell Telephone Company,)
and Southwestern Bell Communications)
Services, Inc. d/b/a Southwestern Bell)
Long Distance for Provision of In-Region)
InterLATA Services in Oklahoma)
)

CC Docket No. 97-121

Comments of the
Competition Policy Institute
on the
Application of SBC Communications to Provide
InterLATA Service in Oklahoma

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SUMMARY

CPI believes that SBC has not met the preconditions for entry into the interLATA market established by the Telecommunications Act of 1996. Among the conditions that SBC has failed to meet are as follows:

1. SBC fails to demonstrate that a competitor is serving business and residential subscribers predominantly over its own facilities.
2. SBC has not fully implemented the competitive checklist because it neither alleges nor demonstrates that it actually provides several of the required items of the “competitive checklist” to competitors.
3. SBC fails to allege or demonstrate that its application can be considered under the so-called “Track B” approach.
4. SBC fails to meet the public interest standard because there is no significant amount of local telephone competition in Oklahoma.

For all the above reasons, the SBC application to provide in-region, interLATA service in Oklahoma should be denied.

I. INTRODUCTION

The Competition Policy Institute (CPI) hereby comments on the Application of SBC Communications, Inc. (SBC) to provide in-region, interLATA service in Oklahoma.¹

SBC alleges that it may file this application under subsection 271(c)(1)(A) because it “is providing Brooks Fiber interconnection and access to [SBC’s] network pursuant to the parties’ negotiated, OCC-approved [Oklahoma Corporation Commission] agreement.”² The agreement with Brooks Fiber is the only interconnection agreement on which SBC bases its Track A argument. SBC also argues that, in the event that the FCC rules that Brooks Fiber does not satisfy the requirements of Track A, SBC nevertheless satisfies Track B because the Oklahoma Corporation Commission has allowed into effect SBC’s statement of generally available terms and conditions.

The following analysis discusses SBC’s effort to meet the requirements of both Track A and Track B and concludes that SBC satisfies neither.

II. SBC’s APPLICATION FAILS TO SATISFY TRACK A.

A. Brooks Fiber is not providing telephone exchange service predominantly over its own facilities.

SBC has not established that any provider of telephone exchange service is

¹Comments were requested on the SBC Application in a Public Notice issued on April 11, 1997, DA 97-753.

²Application, p. 6.

offering telephone exchange service predominantly over its own facilities to serve residential and business subscribers. In order to satisfy Track A, SBC must show that telephone exchange service

may be offered by such competing providers either exclusively . . . or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

SBC bases its entire Track A argument on the operations of Brooks Fiber. SBC admits that any residential customers served by Brooks Fiber are served “only through resale.”³ While the determination of “predominantly” may be difficult in certain cases, it is obvious in this case that a carrier that serves residential customers solely through resale does not meet the “predominance” test.

The purpose of the language requiring competitors to serve business and residential services using its own facilities is to demonstrate the existence of a certain amount of competition that is not totally dependent on the facilities of the incumbent local exchange carrier. This purpose cannot be achieved if an RBOC can satisfy Track A by relying upon a competitor that is dependent upon reselling the services of the Regional Bell Operating Company (RBOC).

Furthermore, SBC fails to show that Brooks Fiber uses predominantly its own facilities. SBC argues that “local exchange facilities can be broken down into

³Application, p. 11.

three principal network elements: local loops, local transport, and local switching.”⁴ SBC implies that, since Brooks Fiber takes at most one of these elements from SBC (local loops), Brooks Fiber provides two of the three types of facilities on its own. SBC thus concludes that “the test of predominance is met.” SBC’s approach to this issue is too simplistic. In many cases, local exchange companies invest more dollars and equipment in the construction of local loops than either transport or switching. Further, many facilities are used for both local service, exchange access, and other types of services. SBC cannot satisfy its burden of demonstrating that Brooks Fiber uses predominantly its own facilities simply by alleging that Brooks Fiber only uses loops provided by SBC.⁵

B. SBC has not demonstrated that it “has fully implemented” the competitive checklist.

Among other requirements, Track A requires that an RBOC “has fully implemented” the competitive checklist in subsection (c)(2)(B). One of the first issues raised by the SBC application is whether SBC can satisfy this obligation by using a state-approved agreement with a competitor in combination with a statement of generally available terms and conditions (“SGAT”).

⁴CPI notes that SBC uses the term “local exchange facilities”. The statutory language, however, refers to “telephone exchange service facilities” and specifically excludes “exchange access services” from “telephone exchange services”. In determining whether Brooks Fiber or any other competitor offers service “predominantly” over its own telephone exchange service facilities, the FCC should not include the facilities to the extent that they are used to provide “exchange access services”.

⁵CPI believes that the FCC can deny SBC’s application under Track A without having to decide at this time whether leased unbundled elements constitute a carrier’s “own” facilities.

SBC suggests that "the applicant may rely upon a statement of terms and conditions, or state-approved agreements, or both, to show compliance with the checklist."⁶ SBC maintains that, since Brooks Fiber and other CLECs likely will not need or want to take every checklist item from SBC, the existence of a state-sanctioned SGAT provides an alternative method for SBC to demonstrate its compliance with checklist items not desired by the competitor.

Other parties have argued that an RBOC may not "mix and match" items in a state-approved agreement and an SGAT. These parties argue that Congress intended that, if an RBOC seeks approval under Track A, the RBOC must provide each of the checklist items under one or more state-approved agreements.

CPI offers a third view of this issue. The statutory language requires each RBOC to "fully implement" the competitive checklist. CPI believes that whether an RBOC "has fully implemented" the checklist is primarily a factual determination, and not a legal issue. CPI believes that each item of the checklist could potentially be fully implemented whether it is available through a state-approved agreement or an SGAT. The principal issue is not what piece of paper sets forth the rules for the checklist item; the issue is whether a competitor can, in fact, obtain each checklist item in a manner that is consistent with the statute and the FCC's rules.

This interpretation is consistent with the statutory language (which does not tie the words "fully implement" directly to either an agreement or a statement).

⁶Application, p. 15.

This interpretation also allows SBC to seek entry even if no competitor requests each item of the checklist. CPI agrees that SBC's entry into the interLATA should not be delayed simply because a competitor chooses to provide a certain element on its own instead of obtaining the element from the RBOC.

On the other hand, it is not enough for SBC to maintain that any checklist item is "available" or is "generally offered". This is the standard for determining whether an RBOC satisfies Track B, not Track A. The RBOC must have fully implemented each checklist item in fact, not just in theory. The strongest evidence that a checklist item is actually implemented is if the item is actually being furnished to a competitor in a manner that is consistent with the Act and the FCC's rules. If an RBOC cannot establish that it is actually furnishing a checklist item to a competitor, the RBOC must carry an especially high burden of demonstrating that the item has, in fact, been implemented.

CPI believes that SBC has failed to provide the factual evidence to support its argument that it has fully implemented the checklist. The statute specifies that the FCC must "find" that the checklist has been fully implemented, yet SBC has not provided sufficient factual information to allow the FCC to make that finding. In its presentation of each checklist item, SBC frequently refers to the fact that the checklist item "is available" to competitors, either through its agreement with Brooks Fiber, its agreement with other competitors, or its SGAT. In many cases, however, SBC does not state that the checklist item is actually being furnished to any competitor.

For instance, in its discussion of checklist items #1 and #2, access and interconnection to unbundled elements, SBC makes no claim that Brooks Fiber is currently taking the elements that are discussed. Indeed, SBC states frequently that it "will" make these unbundled elements available.⁷ SBC's use of the future tense is consistent with its claim that, in requiring the RBOCs to provide access to network facilities and services, Congress did not necessarily require the RBOCs to provide the facilities and services themselves.⁸ The use of the future tense is at odds with the statutory language which requires that the RBOC "has fully implemented" the checklist.

According to SBC's application, there are several other checklist items that are not being furnished. A plain reading of the application reveals that SBC fails even to allege that it is currently furnishing the following checklist items to Brooks Fiber or any other competitor:

⁷Examples of SBC's use of the future tense are as follows: "To ensure equal quality, interconnection with CLECs will be accomplished using the same facilities, interfaces, technical criteria and service standards as [SBC] uses for its own internal operations" (p. 19); "The [Brooks Fiber] Agreement specifically describes the unbundled loop, loop cross connect, switched port, local switching and local switched transport elements [SBC] will furnish upon request." (p. 22)

⁸SBC states, Furthermore, a Bell company "provides access" to its facilities and services through an interconnection agreement when the CLEC has a contractual right to obtain the facilities and services, whether or not they are taken. This follows from Congress's specification that Bell companies must provide access to network facilities and services under an interconnection agreement -- not necessarily the facilities and services themselves -- as a condition of interLATA entry. (Application, p. 16)

- #1: Interconnection
- #2: Access to Unbundled Elements
- #4: Unbundled loops
- #6: Unbundled local switching
- #8: White pages directory listings
- #10: Nondiscriminatory access to databases and associated signaling necessary for call routing and completion
- #12: Local dialing parity

SBC's failure to demonstrate that these items are actually being furnished is strong evidence that SBC has not fully implemented the competitive checklist. As discussed above, CPI believes that, when there is no evidence that any competitor is actually being furnished with a checklist item, SBC bears a particularly high burden of demonstrating that the item is actually available and has been implemented. SBC, however, fails to provide any evidence other than to state that the item is "available".

As a result, SBC has failed to satisfy its burden of establishing on the record in this proceeding that, as a factual matter, each checklist item is being furnished or is implemented. Thus, even if Brooks Fiber is a provider of telephone exchange service to business and residential subscribers predominantly over its own facilities (which CPI believes it is not), SBC fails Track A because it does not satisfy the requirement that it "has fully implemented" the competitive checklist, as required by section 271(d)(3)(A)(i).⁹

⁹CPI's position that SBC has failed to implement the competitive checklist is supported by the Administrative Law Judge before the Oklahoma Corporation Commission. The ALJ found that "all checklist items must be easily and equally accessible, on commercially

III. SBC's APPLICATION FAILS TO SATISFY TRACK B.

SBC also argues that it is authorized to file this application pursuant to section 271(c)(1)(B). The OCC allowed SBC's Statement of generally available terms and conditions into effect on March 17, 1997. SBC maintains that, if the FCC finds that SBC has received no timely request for access and interconnection from any qualifying CLEC, including Brooks Fiber, it is able to apply for interLATA relief under Track B.

As CPI discussed in its Comments on the Motion for Dismissal and Request for Sanctions filed by the Association for Local Telecommunications Services (ALTS), CPI believes that SBC's application under Track B is invalid on its face. In order to trigger Track B, SBC must not have received a request from any company that qualifies as "such provider". SBC does not make this allegation. In fact, SBC cannot make this allegation, because it indicates elsewhere in its application that it has received at least five requests from facilities-based providers, even under the definition of the term "such provider" that SBC prefers. Since SBC has not alleged the proper facts to sustain a filing under Track B, CPI believes that SBC's Track B argument should be dismissed.

If the FCC reaches the merits of SBC's Track B argument, CPI believes that the only logical reading of the language in subparagraph (B) leads to the conclusion

operational terms and on equal terms as to all. The evidence in this case is that [SBC] does not currently provide all checklist items in such a manner." Report and Recommendations of the Administrative Law Judge, Cause No. PUD 970000064, filed April 21, 1997, p. 35.

that Track B is not available to SBC in Oklahoma. CPI believes that an RBOC is precluded from applying under Track B once it has received a single request from an unaffiliated provider of telephone exchange services for access and interconnection to the network facilities of that provider.

This interpretation is supported by the statutory language. The meaning of the term "such provider" can be determined by examining the use of a similar term - "such competing providers" -- in subparagraph (A). In the second sentence of that subparagraph, the term "such competing providers" is distinguished from the service ("such telephone exchange service") and from the type of facilities used ("either exclusively over their own telephone exchange service facilities . . . "). The word "such" in the phrase "such competing providers" appears to mean "unaffiliated". Since the word "such" should mean the same in subparagraph (A) as it means in subparagraph (B), subparagraph (B) simply requires an RBOC to receive a request for access and interconnection from an "unaffiliated provider."

To require a carrier to serve business and residential consumers using its own facilities before requesting access to the RBOC network, as SBC suggests, would "put the cart before the horse". The Telecommunications Act of 1996 was based upon the evidence and belief that competitors need to obtain access to the local telephone company's network before they will be able to serve residential and business customers. If Track B is available until a competitor already serving residential and business customers over its own facilities requests access and interconnection, Track B could be available forever because the competitor would

have no need to obtain access and interconnection with the RBOC. This interpretation would make Track A meaningless.

Rather than referring to a facilities-based provider of telephone exchange service to residential and business subscribers, the term "such provider" should be read to refer simply to an unaffiliated provider of telephone exchange service. Thus, Track B only applies if SBC has not received a request for access and interconnection from an unaffiliated provider of telephone exchange service. Since SBC admits that it has received requests for access and interconnection from at least sixteen and perhaps as many as forty-five unaffiliated providers of telephone exchange service, Track B is not available to SBC.

IV. SBC's APPLICATION FAILS THE PUBLIC INTEREST TEST.

In addition to these material defects discussed above, SBC fails to establish that it meets the public interest prong of the three-part test for interLATA entry. Based on the record, there is an insufficient level of competition for basic local telephone service in Oklahoma to justify allowing SBC into the long distance market at this time.

CPI agrees with SBC that Congress specifically rejected an approach that ties the entry of the RBOCs into the interLATA market with a specific amount of market share loss. Nevertheless, CPI believes firmly that the public interest test is sufficiently broad to allow the FCC to examine the level of competition for local telephone service as one factor in its public interest analysis.

CPI supports policies that promote competition in telecommunications

services in ways that benefit consumers. For this reason, CPI is not pre-disposed for or against RBOC entry into the interLATA market. CPI looks forward to the day when consumers can choose from a wide variety of providers, including the RBOCs, for both local telephone service and long distance service.

Given that there is substantially greater competition for long distance service today than local telephone service, however, CPI believes that the FCC should focus significant attention on the development of local telephone competition in its public interest review of each RBOC application to provide in-region, interLATA service. The level of competition in Oklahoma that SBC provides in its application — service by Brooks Fiber to 21 business customers and four residential customers (all of whom are Brooks employees) — is woefully inadequate to curtail SBC's incentives or ability to engage in anticompetitive behavior.

CPI believes that SBC's application contains an incomplete analysis of the meaning and purpose of the legislation. SBC indicates, for instance, that the intention of Congress was to open all markets to competition, including the interLATA market to entry by the RBOCs, as quickly as possible. In fact, the Telecommunications Act of 1996 reflects a compromise among several different points of views in Congress. While certain Members of Congress advocated allowing the RBOCs into the interLATA market in three years, other Members were just as adamant that the RBOCs should not be allowed to enter the interLATA market until there was a sufficient and identifiable amount of competition for local telephone service. The Telecommunications Act reflects a compromise between

these positions: it requires the RBOCs to fully implement a detailed checklist and requires the FCC to decide whether the entry of the RBOCs into long distance is in the best interests of consumers. While the Act does not allow the FCC to establish a threshold level of local competition as a necessary precondition to granting the application, the public interest standard is sufficiently broad that it allows the FCC to examine the level of competition for local telephone service as one factor of several to consider in making its public interest determination.

In reviewing each application, CPI urges the FCC to adopt a common sense notion of its public interest review. In short, the FCC should consider whether consumers have a realistic choice for local telephone service before allowing the RBOCs into the interLATA market. The value of one additional competitor for local service, essentially doubling the current number of competitors, is much more valuable to consumers than the value of adding one more entrant to the long distance market that is already served by over 500 carriers, of which at least five are facilities-based.

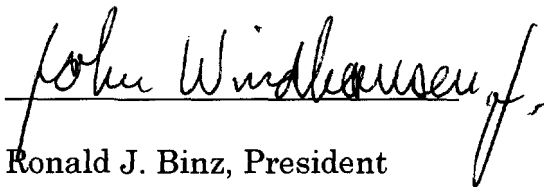
Since SBC fails to demonstrate that there is any significant level of competition for local telephone service in Oklahoma, the SBC application fails the public interest test.

IV. CONCLUSION

SBC's application fails to meet the statutory requirements for interLATA entry on several counts -- it fails to establish the existence of a competitor serving residential and business customers using predominantly its own facilities; it fails to

demonstrate that SBC has fully implemented several of the items contained in the competitive checklist; and it fails to establish the conditions for entry under Track B. Further, SBC fails the public interest test because of the almost complete lack of competition for local telephone service in Oklahoma. For these reasons, CPI urges the FCC to deny the SBC application.

Respectfully Submitted,

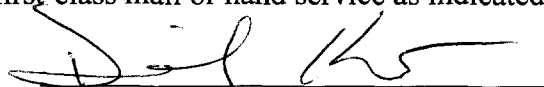
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of the Competition Policy Institute on the Application of SBC to provide in-region, interLATA service in the State of Oklahoma were served May 1, 1997 on the following persons by first-class mail or hand service as indicated.

A handwritten signature in black ink, appearing to read 'Dinh Kuo', is written over a horizontal line.

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